

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-6096

75-6096

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT J. MYKINS,

Plaintiff-Appellee

v.

UNITED STATES TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,

Defendant-Appellant

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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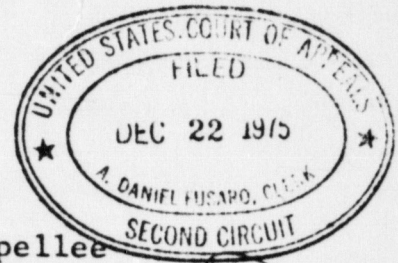


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BRIEF FOR THE APPELLEE

I. STATEMENT OF ISSUES PRESENTED

A. Whether the District Court erred in enjoining the United States from seizing assets of William B. Duffy Carting Co., Inc.

1. Is remedy provided by Sec. 7426 of the Internal Revenue Code (I.R.S. 1954) available to holder of unperfected security interest in taxpayer's property?
2. Was Appellee's security interest in property of taxpayer perfected?

3. What is extent of injunctive relief available under Sec. 7426 of the Internal Revenue Code (I.R.S. 1954)?
- B. Whether the District Court erred in failing to enter findings of fact and conclusions of law when it entered an order enjoining the United States.

II. STATEMENT OF THE CASE

This proceeding arises on appeal by the Government from an order of the United States District Court for the Western District of New York, Hon. Harold P. Burke presiding, enjoining the United States Treasury Department, Internal Revenue Service, from seizing any assets of the William B. Duffy Carting Company, Inc. (the "Debtor") in which the plaintiff (Appellee herein) claims a security interest until such time as the said Court shall file a further order.

The action below arose from the following facts:

1. On or about July 16, 1974, the Appellee, together with one Robert H. Schmidhammer entered into a management agreement with the Debtor pursuant to which the Appellee advanced certain monies to the Debtor.
2. On or about July 17, 1974, the Appellee and the Debtor entered into a security agreement to secure the loan referred to in Paragraph 1, supra. The said security agreement, a copy of which is appended to the Complaint in this action, together with the schedules made a part thereof, created a security interest running to the Appellee in all of the Debtor's accounts, contract rights, chattel paper, and all known personal property of the Debtor. (The Appellant erroneously states, on pg. 3 of its brief, that the security agreement ran only to the Debtor's current and after-acquired "accounts, contract

rights, or chattel paper". The Appellant appears to neglect the personal property of the Debtor listed in Schedules A and B, and incorporated in the agreement.)

3. The Appellee caused financing statements relating to and incorporating by reference the said security agreement to be filed in the Office of the Monroe County Clerk on July 17, 1974, and in the Office of the Secretary of the State of New York on September 26, 1974, in accordance with the provisions of the Uniform Commercial Code, as enacted in New York.
4. Thereafter, the Appellant filed a federal tax lien against the Debtor in the Office of the Monroe County Clerk, seized certain items of personal property of the Debtor, and sold certain of those items at a public sale in violation of the rights of the Appellee under his prior security interest.
5. The Appellee instituted action under Sec. 7426 of the Internal Revenue Code (I.R.S. 1954, 26 USC Sec. 7426) to recover the proceeds of the said public sale, and to enjoin the Appellant from issuing further levies upon the Debtor's property until the Appellee's security interest shall have been satisfied.
6. In an order of July 28, 1975, the District Court enjoined the Appellant from seizing any assets of the Debtor until such time as that Court shall enter a further order.

From the said order, the Appellant has brought the appeal.

III. SUMMARY OF ARGUMENT

The order issued by the District Court was within its jurisdiction and authority, was proper in every respect, and must be sustained.

Where a creditor of a taxpayer has a security interest in property of the taxpayer which is superior to that of the Government for unpaid taxes, the Government may not seize such property and apply the proceeds against the unpaid tax bill. To do so would permit the Government to seize the property of one person to satisfy its claim against another.

To prevent such an inequitable and unconstitutional eventuality, the Congress has enacted Sec. 7426 of the Internal Revenue Code (I.R.S. 1954, 26 USCS Sec. 7426), which permits a person with an interest in property levied upon to satisfy the tax debt of another to recover the proceeds obtained from such an improper levy, and to enjoin future confiscation of such property.

Contrary to the implied assumptions of the Appellant, the rights bestowed by Sec. 7426 are not limited to persons having perfected security interests, but are available to "any person who claims an interest in or lien on" property of the taxpayer.

The Appellee had such an interest, and properly brought the underlying action.

However, even if it were to be presumed that Sec. 7426 applies only where a creditor has a perfected interest (a presumption which flies in the face of the statutory language), the Appellee's

claim was proper since his security interest was perfected. The security agreement establishing the interest incorporated schedules which set forth all known personal property of the Debtor, and the financing statements filed incorporated that agreement.

The injunction was not broader than permissible, or broader than necessary. The Government has waived sovereign immunity under Sec. 7426 as to injunctions to protect secured creditors. Adequate protection required that the Government be enjoined from future attachments of the Creditor's property. Otherwise, the Appellee would be compelled to bring action each time the Government decided to seize further property of the Debtor. Prevention of multiple and vexatious lawsuits is well established as a ground for the issuance of an injunction.

Finally, Judge Burke did not fail to comply with required procedure in not entering findings of fact and conclusions of law, as alleged by the Appellant. The requirement of Rule 52 (a) of the Federal Rules of Civil Procedure, upon which the Appellant bases his assertion, is expressly made inapplicable to orders issued pursuant to motions (with an exception not relevant here).

Accordingly, the order of the District Court should be affirmed in its entirety.

IV. APPLICATION OF SEC. 7426 OF INTERNAL REVENUE CODE TO INTERESTS OR LIENS OTHER THAN PERFECTED SECURITY INTERESTS

A. In General

The Appellant's brief in this appeal is based principally upon the argument that the Appellee was precluded from asserting his rights under Sec. 7426 of the Internal Revenue Code (I.R.S. 1954; 26 USC Sec. 7426) because his security interest in the property of the William B. Duffy Carting Company, Inc. (the "Debtor") was not properly perfected. Assuming, arguendo, that Appellant is correct in asserting that the security interest was not perfected, such argument will not withstand scrutiny. By its terms, Sec. 7426 is not applicable solely to perfected security interests.

Paragraph (a)(1) of Sec. 7426 provides as follows:

(a) Actions permitted. —

(1) Wrongful levy. — If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate. (Emphasis supplied.)

It is to be noted that the benefit of the statute is available to any person "who claims an interest in or lien on such property". The statute does not state that the actions permitted are limited to those brought by persons with perfected

security interests.

It is well settled that a plain and unambiguous statute is to be applied, and not construed, since such a statute speaks for itself, and any attempt to make it clearer is a vain effort and tends only to obscurity. Helvering v New York Trust Co., 292 US 455, 78 L Ed 1361, 54 S Ct 806; Adams Express Co. v Kentucky, 233 US 190, 59 L Ed 1267, 35 S Ct 824; United States v Rice, 327 US 742, 90 L Ed 982, 66 S Ct 835. It is submitted that there is no ambiguity in Sec. 7426, and it is therefore not subject to judicial interpretation. Had Congress desired to limit the remedy of Sec. 7426 to persons holding perfected security interests, it could have so phrased the statute. It chose not to do so, and made the remedy available to "any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property".

However, even if the rules of statutory construction are applied, the same result ensues.

The general rule of statutory construction is that words of a statute will be interpreted in their ordinary acceptance and significance, and the meaning commonly attributed to them. Jones v Liberty Glass Co., 332 US 524, 92 L Ed 142, 63 S Ct 299; Rosenman v United States, 323 US 658, 89 L Ed 535, 65 S Ct 536; Western Union Telegraph Co. v Lenroot, 323 US 490, 89 L Ed 414, 65 S Ct 335. The common meaning of words used by Congress in Sec. 7426 is clear. It is submitted that it is without the auth-

ority of the court to substitute the wording implicitly suggested by the Appellant for that chosen by Congress.

Further, it seems clear that the Congressional purpose in enacting Sec. 7426 would not be supported by the interpretation urged by the Appellant. The Section was designed to protect the interests of persons not liable for a given federal tax, and prevent his property, or his interest in property, from being confiscated by the Federal Government to satisfy the tax debt of another. In this regard, it is submitted that the District Court for the Eastern District of Pennsylvania accurately described the Congressional intent underlying Sec. 7426 in Sylk v United States, 331 F Supp 661, where it was held that the purpose of Congress in enacting the Section was to afford a forum for relief to a third person whose property was wrongfully levied upon to satisfy a tax lien lodged against a taxpayer. Thus the provision is not directed toward the establishment of priority of security interests in a manner similar to that employed by the secured transactions provisions of the Uniform Commercial Code, but is to protect all persons having interests in property levied upon by the Federal Government to satisfy the tax obligations of others.

In view of the foregoing, it is submitted that the Appellant's assertion that the Appellee's security interest in the debtor's property was not perfected, and the Appellant's extensive discussion regarding the operation of secured transaction laws, are irrelevant. Even if it is considered that the Appellee's

security interest was not perfected, such fact could in no way render the decision of the District Court improper.

B. Where Government Has Notice of Interest

Even if it is assumed, arguendo, that the remedy provided by Sec. 7426 is available only to a person whose security interest, under the law of secured transactions, is superior to that of the Government, the Appellant's argument, based upon the alleged absence of perfection of the Appellee's security interest, must fail.

The New York Uniform Commercial Code provides, in Section 9-301 (1)(b), that:

"... an unperfected security interest is subordinate to the rights of ... a person who becomes a lien creditor without knowledge of the security interest and before it is perfected"

It is submitted that knowledge of the interest, within the meaning of Section 9-301 (1)(b), must extend to constructive notice. Robar Associates, Inc. v Lori Motors Sales Corp., 27 Misc 2d 860, 207 NYS 2d 906.

The Appellee filed a financing statement relating to his security interest in the Debtor's property, in accordance with the provisions of Article 9 of the New York Uniform Commercial Code, in the Office of the Monroe County Clerk on July 17, 1974, and with the Office of the Secretary of State of the State of New York on September 26, 1974. Copies of the filing statements are appended to the Complaint in this action. In each such statement, it is clearly indicated that such statement is filed under a

security agreement signed by the Debtor authorizing the Appellee to file it. Thus, the Government was put on notice that the brief statement of the nature of the items in which the security interest existed was not intended to be a full description of those items, but that the complete description of the interest was set forth in ^{the} agreement between the Debtor and the Appellee. It therefore became incumbent upon the Government to make appropriate inquiries of the Appellee or the Debtor prior to levying upon the Debtor's property. Such an inquiry readily would have revealed that the Appellee's security interest effectively extended to all personal property, accounts, contract rights and chattel paper owned by the Debtor.

Such fact is abundantly illustrated by the security agreement between the Appellee and the Debtor, with its attached schedules, copies of which are appended to the Complaint in this action.

V. PERFECTION OF APPELLEE'S SECURITY INTEREST

Although perfection of the Appellee's security interest was not necessary to give Appellee standing to bring this suit, or to justify the action taken by the District Court, it is submitted that the security interest effectively was perfected as to all personal property, accounts, contract rights, and chattel paper of the Debtor.

As stated in Article IV-B, *supra*, the financing statement filed referred to the underlying security agreement between the Appellee and the Debtor. The standard form financing statement adopted in New York contains such a statement, with a block for indicating whether it is applicable. In view of the small overall size of the form, and the limited space provided for a description of the security interest being filed, it is submitted that it is contemplated that reference to an underlying security agreement acts to incorporate the agreement in the statement. Such interpretation satisfies the purpose of the financing statement, which has been said to be to put the public generally on notice of the prior interest so that inquiry can be made. Bank of Utica v Smith Richfield Springs, Inc., 58 Misc. 2d 113, 294 NYS 2d 797. Accordingly, it is submitted that the perfection of the Appellee's security interest was not limited to the brief description contained on the standard financing statement, but extended to all items described in the security agreement, including its schedules.

VI. EXTENT OF INJUNCTIVE RELIEF AVAILABLE

The Appellant asserts that the injunction issued by the District Court was overly broad (Appellant's Brief, Article II, pp 16-17). The Appellant contends that the District Court had authority only to enjoin the seizure of property under previously issued levies, or to award a money judgment if the court determines that property was wrongfully levied upon. The court is without power, according to the Appellant's contention, to proscribe the issuance of new levies. It is submitted that such contention is in error.

Paragraph (b)(1) of Sec. 7426 provides for the issuance of an injunction:

"If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property,..."
(Emphasis supplied.)

Such language clearly contemplates the issuance of injunctions against future improper levies.

Although the Appellant originally argued that this action could not be maintained on the ground that the District Court lacked jurisdiction over the United States, which was alleged not to have waived its sovereign immunity, it appears to have abandoned that argument. Section 7426 clearly and explicitly waives sovereign immunity and permits actions such as this to be maintained. Citizens Bank and Trust Co. of Maryland v United States (1972 DC Md) 344 F Supp 866. Alabama Exchange Bank v United States, (1974 DC Ala) 373 F Supp 1221.

Once sovereign immunity has been waived, the Government places itself in the same position as any other litigant with respect to actions of the class involved in the waiver.

It is well settled that the prevention of a multiplicity of suits is a sufficient ground for equity jurisdiction, and that an injunction may issue to prevent a person from being subjected to the costs and vexation of innumerable suits. Matthews v Rodgers, 284 US 521, 76 L Ed 447, 52 S Ct 217; Cleveland v Cleveland City Railway Co., 194 US 517, 48 L Ed 1102, 24 S Ct 756; Detroit v Detroit Citizens' Street Railway Co., 184 US 368, 46 L Ed 592, 22 S Ct 410; Public National Bank v Keating (CA 2 NY) 47 F 2d 561, Aff'd. 284 US 587, 76 L Ed 507, 52 S Ct 137. Avoidance of multiplicity of suits is of itself, and without reference to other considerations, sufficient to uphold such remedy. Lee v Bickell, 292 US 415, 78 L Ed 1337, 54 S Ct 737.

It is obvious that the Appellee's remedy would have been inadequate had not the District Court enjoined future levies by the Government. Without such relief, the Government would be free to issue more levies, and to protect its interests, the Appellee would be compelled to institute a new action under SEC. 7426 each time the Government elected to do so.

VII. NECESSITY OF FINDINGS OF DISTRICT COURT

The Appellant asserts that the District Court erred in failing to enter findings of fact, basing such contention upon Rule 52 (a) of the Federal Rules of Civil Procedure. However, the final sentence of Rule 52 (a) provides:

"Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56, or any other motion except as provided in Rule 41(b)."

The District Court's order was issued pursuant to the Appellant's motion to dismiss and the Appellee's motion for a preliminary injunction. Neither such motion fell within the purview of Rule 41 (b). The District Court, therefore, was not required to make findings of fact, and did not err in failing to do so.

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Re: Robert J. Mykins vs. United States Treasury Department
Internal Revenue Service (C. A. 2-No. 75-6096)

Dear Mr. Fusaro:

The undersigned, attorney and counsellor at law, herewith certifies that service of two (2) copies of Appellee's brief in the above entitled matter were duly served upon Scott P. Crampton Assistant Attorney General, Tax Division, U. S. Department of Justice, Washington, D.C. 20530, by depositing the same, enclosed in a post-paid properly addressed wrapper in a depository under the exclusive care and custody of the United States Post Office Department within the State of New York and located at 36 West Main Street, Rochester, New York on December 19, 1975.

MITTLEMAN & PIETROPAOLI

By: *Patrick J. Pietropaoli*
Patrick J. Pietropaoli

PJP/jv

VIII. CONCLUSIONS

For the reasons set forth, supra, the Order of the District Court should be affirmed in its entirety.

Respectfully submitted,

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